Supreme Court, U.S.
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No. 94–1390

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

LAWRENCE A. WILLIAMS, MANSION W. CLARK, and DONALD F. MERRIWEATHER

*Plaintiffs-Petitioners,*

*vs.*

KARL NAGEL and STEVEN BARRICK, d/b/a CHAMPAIGN HOUSING ASSOCIATES, a partnership d/b/a PARKSIDE AND MANSARD SQUARE APARTMENTS; STEVEN W. BARRICK AND ASSOCIATES; THE NAGEL GROUP, INC., and THE CITY OF CHAMPAIGN, DONALD HANNA, and DON CARTER,

*Defendants-Respondents.*

On Petition For Writ Of Certiorari
To The Supreme Court Of Illinois

## BRIEF OF NAGEL GROUP IN OPPOSITION TO CERTIORARI

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## QUESTION PRESENTED

The Nagel Group Respondents own and operate an apartment complex. Petitioners desire to visit friends and relatives who are tenants in that complex and who have invited such visits. However, as permitted by the tenants' leases, the Nagel Group has barred Petitioners from the premises, regardless of any tenant invitations they might have. Petitioners assert both a substantive due process right to visit their friends and relatives on the Nagel Group's property, despite otherwise valid "no trespassing" orders, and a procedural due process right to notice and a hearing before being barred.

> On these facts and where undisputed evidence showed that all decisions to forbid trespassing on the property were solely those of the Nagel Group, did the Illinois Supreme Court err in finding that the private decisions were not converted to state action by the Nagel Group's consideration of information and recommendations from the police, by use of police to serve formal notices that trespassing was forbidden, and by arrest of Petitioners when they trespassed despite such warnings?

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## STATEMENT OF FACTS[1]

### Nature of the Case

Respondents Karl Nagel, Steven W. Barrick, Champaign Housing Associates, Steven W. Barrick and Associates, and the Nagel Group Inc. (collectively, "Nagel Group")[2] own and operate Parkside and Mansard Square Apartments ("Parkside")[3] in Champaign, Illinois. (Pet. App. 44) Petitioners Lawrence A. Williams, Mansion W. Clark, and Donald F. Merriweather have friends and relatives who are tenants at Parkside, and those tenants have invited Petitioners to visit them in their respective apartments. (Pet. 1) However, the tenants' leases and the rules adopted by the Nagel Group authorize the Nagel Group, in its sole discretion, to bar non-tenant individuals from the property regardless of whether they have tenant invitations to visit. (Pet. 10; C45-46, 50) The Nagel Group has placed Petitioners on its "no trespass" list, and Petitioners have been served notices forbidding them to be on Parkside premises. (Pet. 1-3) Petitioners Williams and Clark have been arrested for criminal trespass

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1 This case was decided on summary judgment. Accordingly, the factual record must be viewed in the light most favorable to Petitioners, against whom the judgment was rendered. However, where evidence or factual materials were submitted by Respondents, unsupported allegations may be disregarded.

2 The Nagel Group, Inc. has no corporate parents or subsidiaries, other than wholly owned subsidiaries.

3 Parkside participates in federal rent subsidy programs and, in connection therewith, complies with a variety of federal regulations. (Pet. App. 44) Petitioners make no claim that the Nagel Group has violated any such regulations, that any federal agency or official has acted improperly, or that any federal agency or official is implicated in or responsible for any of the activities complained of.

on charges that they entered Parkside premises despite such notices;[4] Petitioner Merriweather was convicted of criminal trespass at Parkside and barred from the premises as a condition of probation. (Pet. 1-3; C158-59) All now fear to enter those premises lest they again be arrested. (Pet. 1-3)

Petitioners desire to visit their friends and relatives at Parkside,[5] and brought this action to enjoin the Nagel Group from excluding them from Parkside or seeking to have them arrested should they enter. (Pet. App. 43-53) They also seek to enjoin Respondents City of Champaign, Donald Hanna (its Chief of Police), and Don Carter (its Deputy Chief of Police) (collectively, "City Respondents") from arresting them for trespass at Parkside when on the premises at tenant invitation.[6] (Pet. App. 43-53) None of the tenants whom Petitioners seek to visit joined in this action.

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4 It is alleged that some of these arrests resulted in no prosecution and none have yet resulted in convictions. (Pet. App. 45, 51) The record does not indicate whether there were or are any pending prosecutions which have not yet been resolved or whether prosecutions might yet be brought based on prior arrests. *The issue here is not whether Petitioners can be convicted for any past conduct, but whether they are entitled to an injunction against future interference with visitation at Parkside.*

5 Regardless of the "no trespass" orders, Petitioners are free to visit with their friends and relatives at any place other than Parkside, so they are not prevented from maintaining relationships and associations, intimate or otherwise, with those individuals.

6 Petitioners previously maintained that, under Illinois law, such invitations rendered their presence lawful. (Pet. App. 47, 51, 53) The Illinois Supreme Court ruled otherwise. 162 Ill. 2d 542, 554-56, 643 N.E.2d 816, 821-22 (Pet. App. 11-13).

The Circuit Court of the Sixth Judicial Circuit, Champaign County, after holding a preliminary injunction hearing and receiving additional affidavits, found insufficient evidence of state action by the Nagel Group in excluding Petitioners from the Parkside premises and rendered summary judgment against Petitioners. The Illinois Appellate Court and Supreme Court affirmed.

**The Legal Context**

In Illinois, as elsewhere, one commits a civil trespass by going or remaining on the property of another without the express or implied consent of the owner or occupant. *People v. Goduto*, 21 Ill. 2d 605, 609, 174 N.E.2d 385, 387 (1961); Restatement (Second) of Torts § 158 (1965). Criminal trespass has an additional requirement: the trespasser must have received prior notice from the owner or occupant forbidding entry or requiring departure. 720 Ill. Comp. Stat. 5/21-3(a) (1994). Moreover, the criminal statute does not apply to anyone legitimately living on the property or anyone invited by such a person. *Id.* 5/21-3(c). But, as the Illinois Supreme Court has construed the statute, the latter exception is not available where the invitation is invalid because the invitee has been barred by the owner and the resident has agreed that those so barred may not be invited. 162 Ill. 2d 542, 554-56, 643 N.E.2d 816, 822 (Pet. App. 11-13); Ill. App. 3d 176, 180-82, 620 N.E.2d 1376, 1379-80 (Pet. App. 22-25).

It is undisputed that Parkside tenants sign leases which require them to obey reasonable rules after being given 30 days notice. (C 45-46, 50) It is also undisputed that one such rule provides that "Management has the right to bar individuals from the property." (Pet. 10) The Illinois Supreme Court held these provisions sufficient to render invalid invitations of those barred by the Nagel Group. 162 Ill.2d at 555-56, 643 N.E.2d at 822 (Pet. App. 12-13).

## The Exclusion Process

Apart from possible unplanned reactions to disturbances, before anyone can be subject to exclusion from Parkside premises, the Nagel Group must place that person on its "no trespass" list. (Pet. 5) To be subject to arrest for criminal trespass, that person must also be served with a barred notice to assure satisfaction of the statutory requirements. (Pet. 4) Barred notices are commonly served before a final decision is made whether to place a person on the "no trespass" list. (Pet. 4-5) But the Illinois Supreme Court found it undisputed that "a barred notice alone would not subject an individual to arrest. . . . [T]he only individuals subject to arrest for criminal trespass were those placed on the "no trespass" list. 162 Ill.2d at 552, 643 N.E.2d at 820 (Pet. App. 10).

It was also undisputed that

> the management of Parkside Apartments made all decisions concerning the "no trespass" list of its own accord. The affidavit submitted by property manager Patricia Jeffers of the Nagel Group unequivocally states that the management of Parkside apartments reserves "complete and total discretion" as to whether or not to place an individual on the "no trespass" list. Jeffers' affidavit is corroborated by the affidavit of Mark Hamilton of Yale Security Services, who also clarified that a distinction exists between being served a barred notice and actually being placed on the "no trespass" list. Hamilton stated that no one was able to place an individual on the "no trespass" list except the employees of Parkside Apartments.

*Id.*

The Petition does not challenge either point. Rather, it notes that the police often provided information or recommendations which were the basis for decisions to place people on the "no trespass" list. (Pet. 6-9, 13-18) But the Illinois Supreme Court considered this point and found it undisputed that, "[w]hile the Nagel Group may have heard recommendations from the Champaign police department as to who should be placed on the 'no trespass' list, such recommendations were purely advisory." *Id.* Such recommendations were sometimes rejected, and "the decision as to which individuals should be placed on the "no trespass" list rested in the sole discretion of the private property owners." *Id.* at 550, 553, 643 N.E.2d at 820, 824 (Pet. App. 8, 10).

The Petition also points to the fact that police, as well as management and its private security force, were authorized by the Nagel Group to serve barred notices. (Pet. 4, 9, 13, 16) But it was undisputed that "[t]he receipt of a barred notice does not, in and of itself, subject an individual to arrest." *Id.* at 553, 643 N.E.2d at 821 (Pet. App. 10). Rather, "the pivotal inquiry here focuses upon the placement of an individual's name on the 'no trespass' list because [such placement] would subject an individual to arrest for criminal trespass," while "mere service of a barred notice" would not.[7] *Id.*

Finally, the Petition complains that the Nagel Group perceives itself as having some interests--controlling crime and

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[7] Petitioners assert that one receiving a barred notice is not informed whether he or she has been placed on the "no trespass" list. (Pet. 5, 22) But a recipient of such a notice who has or receives an invitation from a tenant can have the tenant check on whether the invitee is on the "no trespass" list and, if so, request removal. Such requests are regularly considered and sometimes granted. (Pet. 1-2, 6-7)

protecting Parkside residents--in common with the police and makes decisions on the "no trespass" list in furtherance of those interests. (Pet. 4-9) Not surprisingly, the City Respondents also perceive those common interests and solicit landlords sharing that perception to act accordingly. (Pet. 7, 9-10)

## REASONS FOR DENYING THE WRIT

### I. THE FINDING THAT THE RECORD HERE SHOWS NO STATE ACTION IS NOT ONLY CORRECT AND UNCONTROVERSIAL, BUT IS ALSO SO FACT BOUND AS TO BE UNSUITED FOR THIS COURT'S REVIEW.

As this Court explained in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991):

> That an act violates the Constitution when committed by a government official, however, does not answer the question whether the same act offends constitutional guarantees if committed by a private litigant or his attorney. The Constitution's protections of individual liberty and equal protection apply in general only to action by the government.

The Court went on to explain the basis for this rule:

> The Constitution structures the National Government, confines its actions, and, in regard to certain individual liberties and other specified matters, confines the actions of the States. With a few exceptions, such as the provisions of the Thirteenth Amendment, constitutional guarantees of individual liberty and equal protection do not apply to the actions of private entities. This

> fundamental limitation on the scope of constitutional guarantees "preserves an area of individual freedom by limiting the reach of federal law" and "avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." One great object of the Constitution is to permit citizens to structure their private relations as they choose subject only to the constraints of statutory or decisional law.

*Id.*

Moreover, a "major consequence" of this limitation "is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982).

Action by a private party authorized or permitted by state law, "without something more, [is] not sufficient to justify characterization of a private party as a 'state actor.'" *Id.* at 939. The "'something more' which would convert the private party into a state actor might vary with the circumstances on the case" because "this Court has articulated a number of different factors or tests in different contexts." *Id.*

However, many of those tests can be set aside in light of the claim presented here. Petitioners do not assert that the conduct complained of here involves any public function which "has been 'traditionally the *exclusive* prerogative of the State.'" *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982), quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974) (emphasis by *Rendell-Baker*). *Compare Edmondson v. Leesville Concrete Co., supra* (selection of jurors to exercise state judicial power);

*Terry v. Adams*, 345 U.S. 461 (1953) (election of public officials). Nor does it involve imposition on the state of the task of interpreting and implementing a scheme of discrimination which the state itself could not adopt. *Shelley v. Kraemer*, 334 U.S. 1 (1948) (restrictive covenant, requiring state courts to implement and apply racial criteria to determine who could purchase property).

What is involved here is exclusion by the Nagel Group of particular individuals, selected by it, from its property. That property is private. Only when private property "has taken on all the attributes of a town," *Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 332 (1968) (Black, J., dissenting), construing *Marsh v. Alabama*, 326 U.S. 501 (1946), can such property be treated as public. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 159 (1978); *Hudgens v. NLRB*, 424 U.S. 507, 518-21 (1976); *id.* at 523-24 (concurring op.). Petitioners have made no such showing. Indeed, Petitioners have not even shown that the Nagel Group has opened up Parkside for the use of the general public. Absent such a showing, mere use of state trespass law to enforce a private landowner's decision to exclude particular individuals does not convert the decision to exclude into state action. *Id.* at 518-21; *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567, 570 (1972).

The focus of this case is Petitioners' desire to come upon the premises at Parkside, despite the decision of the Nagel Group to exclude them. They complain about threatened arrest, but they have nothing to fear from the actions of the Nagel Group unless they attempt to trespass on its property. And, as just noted, enforcement of the trespass laws does not subject the decision to exclude to constitutional scrutiny. Moreover, the threatened arrests are challenged only insofar as they obstruct Petitioners' access to Parkside.

Because "constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982), the issue is whether "'there is a sufficiently close nexus between the state and the challenged action [here, placement on the "no trespass" list] so that the action of [the Nagel Group] may fairly be treated as that of the State itself.'" *Id.* quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974). The state can be held responsible for the Nagel Group's decision "only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum*, 457 U.S. at 1004.

Paraphrasing *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961), Petitioners ask (Pet. 13) this court to decide whether:

> "[t]he state has so far insinuated itself into a position of interdependence with [Parkside] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered so purely private as to fall without the scope of the Fourteenth Amendment."

As Petitioners themselves recognize (Pet. 12), this is "necessarily a fact-bound inquiry." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982). "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961). The Illinois Supreme Court correctly articulated the standard, 162 Ill 2d at 549, 643 N.E. 2d at 819 (Pet. App. 7), and engaged in the necessary "sifting" and "weighing." *Id.* at 549-53, 643 N.E.2d at 819-21 (Pet. App. 7-11).

The Illinois Supreme Court recognized that, as Petitioners assert, there was *some* police suggestion or encouragement of the decision to exclude Petitioners, but found those suggestions "purely advisory," so that the ultimate decisions were solely those of the Nagel Group. *Id.* at 552-53, 643 N.E.2d at 820. (Pet. App. 9-10) Petitioners fail to recognize that mere "encouragement" is not sufficient to convert private decisions to state action. Rather, that encouragement must be so "significant . . . that the decision must in law be deemed to be that of the state." *Blum*, 457 U.S. at 1004. Surely review by this Court is not necessary to reiterate that well-settled point.

It appears that what Petitioners really seek is a resifting and reweighing by this Court of the "facts and circumstances" considered by the Illinois Supreme Court. But, at least for the present, there is no reason to believe that such review would have any significance beyond this case. Apparently, no other case has yet reached the merits of a challenge to anything remotely similar, so there can be no conflict among lower courts. Petitioners make no showing that the practices at issue here are widespread. And even if such practices may become more common, they are likely to exhibit significant factual variations. Only after other courts have examined such variations and assessed their significance will it be known whether any guidance from this Court is necessary and, if so, on what issues.

While the Nagel Group believes the Illinois Supreme Court's decision to be clearly correct, it submits that it is even more obvious that there are no "special and important reasons" for review by this Court. Rule 10.1.

## II. PETITIONERS' ATTEMPTED CHALLENGE TO THE VALIDITY OF THE CRIMINAL TRESPASS STATUTE IS NEITHER PROPERLY PRESENTED NOR EVEN ARGUABLY MERITORIOUS.

Petitioners seek to assert that the Illinois criminal trespass statute is unconstitutional, because "the invitee exception to trespass is unavailable to guests of tenants under rules reserving landlord barment authority." (Pet. 20) But no such argument was presented to the Illinois courts until the petition for rehearing in the Illinois Supreme Court. Illinois courts ordinarily do not consider issues raised for the first time on rehearing, *Schlenz v. Castle*, 115 Ill. 2d 135, 145, 503 N.E.2d 241, 245 (1986), *aff'g* 132 Ill. App. 3d 993, 1018, 477 N.E.2d 697, 716 (1985), and there is no indication that the Illinois Supreme Court did so here. Accordingly, the issue was not properly presented below and preserved for review by this Court. *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969) (requirement that issue be presented to state court); *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945) (first presentation in rehearing petition insufficient unless court actually considers and decides issue).

Petitioners seek to avoid this problem by asserting that the issue arose for the first time as a result of the Illinois Supreme Court's decision. (Pet. 10) However, the Appellate Court's construction of the statute, though slightly different, had the same effect as that of the Illinois Supreme Court: the tenant invitations relied upon by Petitioners give them no right to enter Parkside. And, to the extent that Petitioners seek to rely on supposed vagueness of the statute, their point is misdirected. Petitioners are not forced to guess at the meaning of the statute, at the risk of *criminal* penalties. Rather, the Illinois Supreme Court has authoritatively construed the statute and, based on that construction, found that *plaintiffs have no right to an injunction protecting their future conduct.* If Petitioners are ever prosecuted for past conduct, they are still free to argue that the statutory

text gave inadequate notice that such conduct was proscribed or that they had inadequate warning that their invitations were invalid.

Surely, Petitioners cannot *now* claim ignorance of the lease terms and rules at Parkside which, the Illinois Supreme Court has held, permit them to be barred from the premises. Thus, there is no basis to enjoin either their exclusion from Parkside or their arrest should they choose to trespass.

Application of the trespass statute to others (who may claim ignorance of the situation at Parkside) or to Petitioners at other locations is not at issue in this case. There will be time enough to address it should there be a prosecution in which a defendant is denied the opportunity to raise such ignorance as a defense or is convicted despite showing such ignorance.

## CONCLUSION

For all of the reasons stated above, certiorari should be denied.

Respectfully submitted,

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